Articles

THE EFFECT OF THE MORATORIUM ON PROPERTY OWNERS DURING BUSINESS RESCUE

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Abstract

A burning issue in South African company law is the encroachment of the business rescue provisions of the new Companies Act 71 of 2008 on the rights of landlords and other property owners. A landlord who has concluded a contract of lease with a company, frequently finds himself in an unenviable position if the company goes into business rescue. The company often remains in occupation of the leased premises during business rescue and, if this is done without the payment of rent, the business rescue endeavour is effectively driven at the landlord's expense. The focus of this two-part series of articles is on the two chief predicaments facing the property owner who finds its property in the possession of a company under business rescue, namely, the recovery of the property by the property owner; and the ongoing payment of rent and other recurring charges. This article discusses the moratorium in business rescue with a specific focus on its effect on the property owner. A critical analysis of recent judicial decisions on the moratorium is included, together with a discussion of the legal position in comparable foreign jurisdictions. The second article will focus on the safeguards and protective measures for property owners during the business rescue process. It will be published in the following issue of this journal.

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I INTRODUCTION

A burning issue in South African company law is the encroachment of the business rescue provisions in the Companies Act 71 of 2008 (the Act) on the proprietary rights of landlords and other property owners. A landlord who has concluded a contract of lease with a company or close corporation, frequently finds himself, herself or itself in an unenviable position if the tenant goes into business rescue. The tenant often remains in occupation of the leased premises during business rescue and, if this is done without the ongoing payment of rent, the business rescue endeavour is effectively driven at the expense of the landlord. It would be the harshest encroachment on the rights of the landlord if the tenant in business rescue were permitted to stay on the leased premises indefinitely without paying rent or compensation. This outcome must, as far as possible, be avoided.

Not only is the payment of rent involved, but also the payment of other charges, such as municipal rates and taxes, and charges for public utility services such as electricity, water, sanitation, and refuse removal. Since the primary obligation falls on the landlord to pay for these utilities, he or she is effectively compelled to continue funding the tenant's use of utilities and services for as long as the tenant remains in occupation of the premises. The landlord is often unable to recover these costs from the tenant in business rescue.

It is not exclusively landlords or lessors of immovable property who are beset by these problems, but also other property owners whose property is used, occupied, or possessed by a company in business rescue. These include the owner of instalment-sale goods that were sold to the company under an instalment-sale agreement, and the lessor or hirer of equipment, motor vehicles, or other movable property. Although this article in the main considers the lessor of immovable property, it applies equally to other such property owners.

The focus of this two-part series of articles is on the two chief problems facing the property owner who finds its property in the possession of a company under business rescue: the recovery of the property; and the ongoing payment of rent and other recurring charges. The current article discusses the moratorium in business rescue with specific focus on the effect of the moratorium on the property owner. The issue of whether the property owner is prevented by the moratorium from cancelling its lease agreement with a company in business rescue, is considered in paragraph III. Paragraph IV examines the impact of a suspension of the agreement by the business rescue practitioner under section 136(2)*(a)* of the Act. The focus of paragraph

V is on the recovery of property by the property owner and, in particular, whether the application of the moratorium is obviated or averted by the cancellation of the lease agreement by the property owner. Paragraph V commences with a critical analysis of recent judicial decisions on the moratorium, in which it is shown that the courts are, regrettably, whittling away the moratorium on the repossession of property. This is followed by the suggestion of a more suitable approach to the moratorium in the light of its fundamental purpose. The suggested approach to the moratorium is reinforced by a discussion of the legal position in comparable foreign jurisdictions.

The second article — which is set to be published in the next issue of this journal — focuses on the protective measures available, or which ought to be available, to property owners whose property is in the possession of a company under business rescue. The safeguards that are built into the Act for property owners are discussed (in paragraph VIII), followed by guiding principles for the judicial application of these safeguards in a manner that balances the interests of the company under business rescue and those of the property owner (paragraphs IX–XI). Guidelines are proposed, first, for the repossession of property by the property owner and, secondly, for the recovery of rent and other compensation by the property owner during business rescue. Whether post-commencement rent has, and should have, a priority status as post-commencement finance is also considered (paragraph XII)

Section 5(2) of the Act enjoins a court interpreting or applying the Act to consider, to the extent appropriate, foreign company law. Bearing in mind that the business rescue regime in South African law is based largely[1] on the United Kingdom[2] and the Australian[3] models, and further imports many aspects of Chapter 11 of the USA Bankruptcy Code,[4] the legal position in these jurisdictions is considered where relevant. The different business practices and business rescue culture in other jurisdictions are taken into account.

II THE MORATORIUM IN BUSINESS RESCUE

'A robust rescue regime is essential if ailing companies are to be given every reasonable chance to regain health'.[5] A central pillar of a successful

[1] F H I Cassim, 'Business Rescue and Compromises' in F H I Cassim et al, *Contemporary Company Law* 2ed (Juta 2012) 861–864, 866.

[2] In terms of the Insolvency Act, 1986, as amended by the Enterprise Act, 2002.

[3] In terms of the Australian Corporations Act, 2001.

[4] Bankruptcy Reform Act 1978 11 USC.

[5] Finch, 'Control and co-ordination in corporate rescue' (2005) 25 *Legal Studies* 374 .

business rescue regime is the statutory moratorium. Without the moratorium, it would simply not be possible to rescue a company. As soon as business rescue proceedings commence, there is an automatic stay on or suspension of legal proceedings and enforcement action by creditors against the company, its property, and its assets.[6] No legal steps may be taken by creditors to enforce any security, nor may legal proceedings or execution be commenced or continued without leave of the court or the business rescue practitioner. The moratorium freezes the rights of both secured and unsecured creditors. It extends to any property lawfully in the possession of the company. In this regard, section 133(1) of the Act provides that:

> 'During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum...'.

This is not a blanket prohibition. The automatic stay could in appropriate circumstances be lifted, as section 133(1)*(a)* and *(b)* of the Act provides that legal proceedings or enforcement action may be commenced with the written consent of the business rescue practitioner or with the leave of the court.[7]

Undoubtedly, the moratorium causes injustice to creditors and property owners whose claims are postponed for the sake of saving viable companies. But this is essential if the company is to be rescued. How else could the rescue of the company be facilitated? The moratorium is intended to protect the company from harassment by its creditors and property owners. It is fundamental to the effectiveness of business rescue. It provides crucial breathing space for the business rescue practitioner to reorganise the debts and restructure the affairs of a company in financial distress, in a manner that allows it to return to financial viability, without constantly having to keep enforcement claims by individual creditors at bay.[8] Such interference by creditors would hamper the ability of the business rescue practitioner to save the

[6] Section 133(1) of the Act.

[7] Section 133(1)*(a)*–*(b)* of the Act. See further s 133(1)*(c)*–*(f)* for the other exceptions to the general principle of a stay of legal proceedings or enforcement action against the company.

[8] F H I Cassim in F H I Cassim et al (Juta 2012) 878–879, as approved by the court in *Cloete Murray v FirstRand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) para 14. See also *Chetty t/a Nationwide Electrical v Hart* 2015 (6) SA 424 (SCA) paras 28 and 39; *Elias Mechanicos Building & Civil Engineering Contractors (Pty) Ltd v Stedone Developments (Pty) Ltd* 2015 (4) SA 485 (KZD) paras 7, 9, and 11; *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd* [2013] ZAGPJHC 109 (13/12406 10 May 2013) para 4.

company or to realise the aims of the business rescue process in terms of section 128(1)*(b)*(iii).

One of the effects of the moratorium on property interests is that owners of property are immobilised from exercising their proprietary rights to recover property in the lawful possession of a company under business rescue, unless the business rescue practitioner gives written consent. Section 134(1)*(c)* of the Act states that:

> 'During a company's business rescue proceedings... despite any provision of an agreement to the contrary, no person may exercise any right in respect of any property in the lawful possession of the company, irrespective of whether the property is owned by the company, except to the extent that the practitioner consents in writing.'

In short, property owners whose property is used or occupied by the company, such as the owners of hired and leased property or sellers in an instalment-sale transaction, are prevented from removing the company from the leased premises or from recovering possession of their property, by virtue of the moratorium in terms of section 133(1) and the protection afforded to the company by section 134(1)*(c)*. For the duration of the business rescue process, property owners are restrained from claiming their property that is in the company's possession so as not to imperil the chances of resuscitating the company. The object of business rescue would be jeopardised if landlords or property owners were able to seize premises that are essential to the company's business. It must be borne in mind that the company's continued occupation of leased business premises or its ongoing possession of hired equipment or motor vehicles, may be key components of its business, and may be critical to the success of the rescue endeavour.[9]

III CANCELLATION OF THE AGREEMENT DURING BUSINESS RESCUE

The moratorium in section 133(1) does not prevent a creditor from cancelling an agreement with a company in business rescue. The moratorium is a general moratorium or restriction on commencing or proceeding with any 'legal proceeding, including enforcement action'. Since cancellation does not amount to 'enforcement action' within the meaning of section 133(1), the landlord or property owner (or any other creditor for that matter) is entitled to cancel its agreement of lease or other relevant agreement with a company in business rescue — it does

[9] See para V(b) below.

not need the permission of the business rescue practitioner or the court under section 133(1)*(a)* and *(b)* to do so.

This principle was correctly stated by the Supreme Court of Appeal in *Cloete Murray v FirstRand Bank Ltd t/a Wesbank.*[10] The respondent (Wesbank) concluded an instalment sale agreement with Skyline Crane Hire (Pty) Ltd (Skyline) in terms of which Wesbank sold movable goods to Skyline but retained ownership of the goods until full payment of the purchase price was made. When the board of Skyline resolved that it be placed under voluntary business rescue in terms of section 129 of the Act, Wesbank dispatched a letter of cancellation to Skyline cancelling the instalment sale agreement with immediate effect on the ground that Skyline was in arrears with the payment of the monthly instalments due under the agreement. The Supreme Court of Appeal ruled that Wesbank had the right to cancel the agreement with Skyline in business rescue. The court cogently reasoned that the concepts of enforcement and cancellation are mutually exclusive in our law of contract. First, enforcement action in our legal parlance usually refers to the enforcement of obligations, while cancellation connotes the termination of obligations between the parties to an agreement.[11] Secondly, cancellation is a unilateral act by a party to an agreement in the event of a breach of contract, while enforcement action is considered a species of legal proceeding or, at least, is meant to have its origin in legal proceedings. This is indicated by the inclusion of the term 'enforcement action' under the generic phrase 'legal proceeding' in section 133(1). This is fortified by the fact that section 133(1) provides that no legal proceeding, including enforcement action, may be commenced or proceeded with 'in any forum', such as a court or a tribunal. Enforcement action thus relates to formal proceedings ancillary to legal proceedings, such as the enforcement or execution of court orders by means of writs of execution or attachment.[12] Third, cancellation, in contrast with enforcement action, is not 'commenced or proceeded with in any forum' as envisaged by section 133(1).[13]

The principle that a creditor is at liberty to cancel an agreement with a company under business rescue, is in harmony with the fundamental purpose and philosophy of the moratorium in business rescue. In this regard, the purpose of the moratorium on the enforcement of remedies is to give the business rescue practitioner a period of grace during which

[10] 2015 (3) SA 438 (SCA).
[11] *Cloete Murray* paras 32–33.
[12] *Cloete Murray* paras 32, 33 and 40.
[13] *Cloete Murray* para 33.

to reorganise and reschedule the company's debts, without having to fend off actions by creditors to enforce their rights. This purpose is realised by suspending the rights of creditors to enforce their claims against the company, and by restricting property owners from reclaiming possession of their property from the company. But the mere *cancellation* of the contract by the property owner has no impact, in itself, on the company's continued possession, occupation, or use of the property. Where, for instance, a landlord serves its tenant under business rescue with a notice of cancellation of the lease agreement, the cancellation of the agreement does not on its own deprive the tenant of continued occupation of the premises — for it does not automatically entitle the landlord to *repossess* the premises.[14] Consequently, the cancellation of a contract with a company in business rescue does no violence to the fundamental objective of the moratorium.

This submission is supported by judicial authority in the United Kingdom (UK). The UK Insolvency Act, 1986, as amended by the Enterprise Act, 2002, imposes a moratorium or restriction on legal process, including legal proceedings, execution, and distress, which may not be instituted or continued against a company in administration, save with the consent of the administrator or leave of the court.[15] The question in *Re Olympia and York Canary Wharf Ltd*[16] was whether this moratorium applies to the service of a contractual notice. On the facts of *Re Olympia and York* the creditor of a company in administration served a notice on a company making time of the essence, and wished to serve a further notice accepting the company's repudiatory breach of contract in order to terminate the contract and obtain a claim for damages. The court held — in similar vein to the South African court in *Cloete Murray v FirstRand Bank Ltd t/a Wesbank*[17] — that as a 'legal process' requires the backing of the court, the service of a contractual notice falls outside the compass of a legal process and hence outside the ambit of the moratorium.

Likewise, in Australian law, a lessor of property is free to cancel its lease with a company in voluntary administration. A statutory moratorium operates on the recovery of property by the owner or lessor of any property that is used or occupied by, or is in the possession of, a company under voluntary administration.[18] The moratorium, however, does not prevent the lessor or property owner from giving notices in

[14] See para V below.
[15] Paragraph 43(6) of Schedule B1 to the Insolvency Act, 1986.
[16] [1993] BCC 154; see also *McMullen & Sons Ltd v Cerrone* [1994] BCC 25.
[17] 2015 (3) SA 438 (SCA).
[18] Section 441C of the Australian Corporations Act, 2001.

relation to its property[19] — for example, a notice of cancellation of the lease agreement. In contradistinction with the United Kingdom and South Africa, in which it falls to the courts to decide whether the moratorium applies to the service of a contractual notice, this issue in Australian law is specifically decreed by statute.[20]

In summary, if a company in business rescue breaches its contractual obligations to the property owner, such as its obligation to pay rent or other charges, the property owner is at liberty to cancel the agreement during business rescue. It also makes no difference whether the breach of contract occurs before or after the commencement of business rescue proceedings. The cancellation of an agreement is patently not obstructed by the moratorium. What the moratorium does (or should) impede, though, is the subsequent repossession of the property by the property owner. This is discussed further in paragraph V. The effect or advantage to the property owner of cancelling an agreement is also explained in paragraph V, in particular in paragraph V*(d)*.

IV THE EFFECT OF SUSPENSION OF AN AGREEMENT

The prerogative of the lessor to cancel its lease agreement with a company in business rescue, may possibly be thwarted by suspension of the agreement by the business rescue practitioner in terms of section 136(2)*(a)* of the Act.[21] It is submitted, however, that whether a suspension of the agreement protects it from cancellation by the lessor, depends on the circumstances.

The business rescue practitioner's power of suspension is set out in section 136(2)*(a)* of the Act, which provides that, despite any provision in an agreement to the contrary, during business rescue proceedings the practitioner may

> 'entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that—

[19] Section 441J of the Australian Corporations Act, 2001.

[20] Section 441J of the Australian Corporations Act, 2001. The legal position of landlords during business rescue is quite different in the US legislation, and is dealt with separately in para XII of the second article in this series of articles.

[21] See *Cloete Murray* para 35. However, see also *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd* 2017 (4) SA 592 (GJ) paras 35–40, which states that the suspension of an agreement by the business rescue practitioner entitles the creditor to elect either to rely on the exceptio non adimpleti contractus to suspend its counter performance, or to cancel the agreement for breach. This dictum in *BP Southern Africa* conflicts with the statement by the Supreme Court of Appeal in *Cloete Murray* para 35, and also fails to take account of the other relevant authorities discussed in para IV above.

(i) arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and
(ii) would otherwise become due during the business rescue proceedings'.

Where the business rescue practitioner has suspended the company's obligations — for example, its duty to pay its monthly rental and municipal utilities in terms of a pre-existing agreement of lease, or to pay its monthly instalments under a pre-existing instalment sale agreement — the effect of the suspension is that in failing to make these ongoing payments, the company will not be in breach of the agreement. There will accordingly be no legal basis on which the property owner may cancel the agreement.

This, however, is subject to an important qualification. It is submitted that the power of suspension applies only to contractual obligations of the company that would become due *during* the business rescue proceedings, as appears from a literal reading of section 136(2)*(a)*(ii). Consequently, only post-commencement obligations of the company may be suspended, but not pre-commencement obligations. It follows that where the company, at some stage *before* the commencement of business rescue, has failed to honour its obligations to the property owner, such as its obligation to pay rent, then the property owner retains the right during business rescue to cancel the agreement — notwithstanding the suspension of the agreement by the business rescue practitioner. Of course, if the property owner has already cancelled the breached contract before the initiation of business rescue proceedings, the business rescue practitioner may not suspend the (cancelled) contract in the first place.

The above submissions are supported by the ruling of the court in *178 Stamford Hill CC v Velvet Star Entertainment CC*,[22] in which a company in business rescue, trading as Bellagio Night Club, failed to honour its obligations to pay arrear rental in terms of a contract of a lease. The court ruled that the suspension of the lease by the business rescue practitioners had no effect on the claim for rental due prior to the commencement of business rescue proceedings,[23] and that the landlord was accordingly entitled to cancel the lease agreement. The court stated that:

[22] (1506/15) [2015] ZAKZDHC 34 (1 April 2015).
[23] *178 Stamford Hill CC* paras 25 and 27.

> 'Section 136(2) as it now is means that the rentals due by the respondent for the months after the business rescue proceedings commenced cannot be claimed, but that the claim for rental due when the business rescue proceedings commenced were unaffected by the business rescue and could be claimed.'[24]

This is a correct analysis of the practitioner's power of suspension.

In contrast to the analysis in *Velvet Star Entertainment*, is the approach suggested by the court in *Kythera Court v Le Rendez-Vous Café CC.*[25] The tenant in *Kythera Court,* as had the nightclub in *178 Stamford Hill CC,* fell into arrears with the payment of rental to its landlord before the commencement of business rescue proceedings. Although the business rescue practitioner did not invoke his power of suspension, the court remarked that had he done so, the landlord would have been prevented from cancelling the lease agreement.[26] The analysis suggested in *Kythera Court* is unacceptable for the reasons discussed above. The power of suspension, correctly interpreted, applies only to post-commencement obligations and not to pre-commencement obligations of the company under business rescue.[27]

V REPOSSESSION OF THE PROPERTY BY THE PROPERTY OWNER

(a) Judicial decisions: Whittling away the moratorium

The Supreme Court of Appeal in *Cloete Murray v FirstRand Bank Ltd t/a Wesbank*[28] held that there is no moratorium or prohibition on a property owner cancelling its agreement with a company in business rescue.[29] But the Supreme Court of Appeal did not pronounce on whether, following such cancellation, the property owner is at liberty to bring legal proceedings for the recovery of its property or, alternatively, whether the property owner remains restricted from claiming the repossession of its property from the company by virtue of the general moratorium in section 133(1) and the protection of property interests under section 134(1)*(c)*. On the facts of the case it was unnecessary for

[24] *178 Stamford Hill CC* para 25.

[25] 2016 (6) SA 63 (GJ).

[26] *Kythera Court* paras 15 and 31.

[27] For a discussion of the protective measures and recourse for property owners whose rights have been suspended under s 136(2)*(a)*, see para XI of the second article in this series which will appear in the next issue of this journal.

[28] 2015 (3) SA 438 (SCA).

[29] As discussed in para III above.

the court to decide this issue, as the business rescue practitioner had in any event given his consent to the repossession of the goods that formed the subject matter of the cancelled instalment sale agreement by Wesbank.

In some cases the High Court has made an order for the ejection of a company in business rescue from leased premises, whilst declining to decide the important issue of whether the moratorium applies to such ejection proceedings subsequent to the lawful cancellation of the lease. In *178 Stamford Hill CC,*[30] for instance, the High Court merely stated that 'insofar as is necessary, leave [of the court under s 133(1)*(b)*] is given to the applicant to bring these proceedings'.[31] While the legal point was not determined in *178 Stamford Hill CC*, the issue has been pronounced on in several other decisions of the High Courts. It is highly regrettable that, in so doing, the High Courts have eroded the effect of the general moratorium in section 133(1).

In *Madodza (Pty) Ltd v Absa Bank Ltd*,[32] Absa Bank cancelled its finance agreements with the applicant in respect of certain motor vehicles due to the failure of the applicant to make its monthly payments. As the vehicles were in the applicant's possession, Absa Bank obtained court orders for the return of the vehicles by the applicant. The applicant then went into business rescue. When the sheriff sought to remove the vehicles from the applicant's business premises, the applicant contended that, as the moratorium in section 133(1) of the Act prohibits enforcement actions, the court orders for the return of the vehicles could not be executed without the consent of the business rescue practitioner or leave of the court. Because the applicant conducted business as a transport company, the use of the vehicles was a key component of its business and was critical to the success of the business-rescue endeavour. The court, however, ruled against the applicant. It found that since the agreements had been cancelled and court orders had been obtained for the return of the motor vehicles by the applicant, the vehicles were not 'lawfully in its possession' and it had thus failed to meet the requirements for reliance on section 133(1).[33] This, with respect, is a retrograde decision in that the court overlooked the fundamental objective of the general moratorium in section 133(1), as is explained further in paragraph V*(b)* below.

As with the facts in *Madodza (Pty) Ltd*, in *JVJ Logistics (Pty) Ltd v*

[30] (1506/15) [2015] ZAKZDHC 34 (1 April 2015).
[31] *178 Stamford Hill CC* para 31; see also para 30.
[32] (38906/2012) [2012] ZAGPPHC 165 (15 August 2012).
[33] *Madodza (Pty) Ltd* para 17.

Standard Bank of South Africa Ltd[34] the applicant fell into arrears with instalments owed to Standard Bank under an instalment sale agreement for a motor vehicle. The applicant took possession of the vehicle in terms of the agreement, while Standard Bank retained ownership of the vehicle, pending final payment. After Standard Bank cancelled the instalment sale agreement and obtained a court order for the immediate return of the vehicle, the applicant was placed under voluntary business rescue. The applicant needed the vehicle in order to continue operating its business during business rescue. It thus sought an interdict restraining the service and implementation of the warrant under which the motor vehicle would be seized and returned to Standard Bank. The court denied the interdict, and instead agreed with the ruling in *Madodza (Pty) Ltd* that section 133(1) of the Act was not an obstacle to the recovery of the vehicle. The court stated that the execution or enforcement of an order of court made before the commencement of business rescue would amount to 'enforcement action' within the meaning of section 133(1),[35] but the applicant could not rely on this section because it was not in 'lawful' possession of the relevant vehicle as required.[36] According to the court, the applicant acquired 'lawful' possession when put in possession of the vehicle in terms of the instalment sale agreement, but lost it when the agreement was cancelled. The court thus adopted an unduly wide interpretation of 'lawful' possession in order to prevent the application of the moratorium in section 133(1).[37]

The courts in both *Madodza Pty (Ltd)* and *JVJ Logistics Pty (Ltd)* ruled, in effect, that the general moratorium in business rescue contained in section 133(1) would not apply where, before the commencement of business rescue proceedings, the property owner both cancelled its agreement with the company and obtained a court order for the return of its property. The moratorium was even further whittled away in *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd.*[38] The question here was whether the moratorium operates in circumstances where, before the initiation of business rescue proceedings, the property owner merely cancelled the lease agreement and launched an application to eject the company from the property.

In *Southern Value Consortium*, an agreement of lease was entered into

[34] 2016 (6) SA 448 (KZD).

[35] *JVJ Logistics (Pty) Ltd* para 1. See also *Cloete Murray* para 32, where the court stated that enforcement action includes the enforcement or execution of court orders by means of writs of execution or attachment.

[36] *JVJ Logistics (Pty) Ltd* paras 3 and 51.

[37] See para V*(d)* below.

[38] 2016 (6) SA 501 (WCC).

between the owner of leased premises and the respondent. Due to the failure of the respondent to pay rent and other additional charges owed by it (including utility consumption, operating costs, and municipal charges), the lessor validly cancelled the lease agreement. Three months later, an application was brought to eject the respondent from the property. The respondent thereafter was voluntarily placed in business rescue in terms of section 129 of the Act. The principal defence raised by the business rescue practitioners was that the ejection proceedings were barred by the moratorium in section 133(1) and by the provisions of section 134(1)*(c)* of the Act. The High Court pronounced that after the cancellation of the lease agreement, the respondent was no longer in 'lawful' possession of the property. Since 'lawful possession' is an essential requirement for both the application of the moratorium in section 133(1) and the protection afforded by section 134(1)*(c)*, the court decided that the business rescue practitioners could not rely on these provisions as a defence to the applicant's claim for the ejection of the respondent.[39] The court opined that it could not have been the legislature's intention that a company in business rescue could restructure its affairs by utilising assets to which it had no lawful claim.[40]

A common thread in all three of the above cases is the legal position of the operation of the moratorium in circumstances where the property owner has cancelled its agreement with the company *before* the commencement of business rescue proceedings. In contrast, in *Kythera Court v Le Rendez-Vous Café CC*[41] the court was called upon to decide whether the moratorium prevents ejection proceedings in circumstances where the property owner cancels its agreement with the company in business rescue *after* the commencement of business rescue proceedings.

Here the tenant, Le Rendez-Vous Café CC trading as Newscafe, after falling into three months' arrears with the payment of rental and municipal utilities to its landlord, went into business rescue. Before the commencement of the business rescue proceedings, the landlord sent two breach notices to Le Rendez-Vous Café, but the landlord cancelled the lease agreement only three months after the commencement of business rescue. The landlord thereafter sought an order of court to evict Le Rendez-Vous Café CC from its premises. The court stated that an agreement may be cancelled during business rescue proceedings, as settled by the Supreme Court of Appeal in *Cloete Murray v FirstRand*

[39] *Southern Value Consortium* paras 29–32.
[40] *Southern Value Consortium* para 35.
[41] 2016 (6) SA 63 (GJ).

Bank Ltd t/a Wesbank.[42] On the plain meaning of the wording in sections 133(1) and 134(1)*(c)* of the Act, vindicatory proceedings, or proceedings for the repossession of property that is in the unlawful possession of a company in business rescue, are permissible.[43] The court in *Kythera Court* found that, as it is the duty of the lessee to vacate the property on the termination of a lease, the failure to vacate rendered Le Rendez-Vouz Café an unlawful occupier. The wording of section 133(1) renders the moratorium inapplicable to legal proceedings or enforcement action in relation to property that is unlawfully possessed by the company.[44] The court therefore ruled that the general moratorium in section 133(1) does not cover legal proceedings for ejection where the lease has been validly cancelled, but the company has failed to vacate the property. The landlord was consequently held not to require the leave of the court in terms of section 133(1)*(b)* to bring the ejection proceedings.[45]

It is clear from the line of cases above that South African courts are progressively chipping away at the moratorium contained in section 133(1) of the Act. The moratorium is intended to be an all-encompassing bar against legal proceedings and enforcement action during business rescue, but the courts are making ill-advised inroads into the scope of the moratorium. Judicial exceptions have been created that erode the moratorium not only where the property owner has obtained a court order for the return of its property before the commencement of business rescue, but also in cases where the property owner has not launched ejection proceedings at the time business rescue commences, and even in cases where the property owner has not even cancelled the lease agreement at the time business rescue commences. In effect, the courts are permitting the property owner to circumvent the moratorium and proceed to recover its property by a simple cancellation of its agreement with the company, whether the cancellation takes place before or after the commencement of business rescue proceedings. The judicial approach appears to be that

> '[i]t could not have been the intention of the legislature to frustrate the rights of property owners and render them remediless during business rescue proceedings'.[46]

[42] 2015 (3) SA 438 (SCA).
[43] *Kythera Court* paras 9–11.
[44] *Kythera Court* para 9.
[45] *Kythera Court* paras 14 and 16.
[46] *Kythera Court* para 12.

By whittling away the moratorium, the courts are undermining the very purpose of business rescue. This aberrant trend must be reversed.[47]

(b) Purpose of the moratorium on the repossession of property

The suspension of the rights of property owners and lessors to claim the recovery of their property from a company in business rescue by virtue of the moratorium in section 133(1) of the Act, is a central pillar of the business rescue regime. It must not be eroded by the courts. It is instrumental in achieving the goal of business rescue which, as set out in section 128(1)*(b)*(iii) of the Act, is to rehabilitate a company in financial distress by providing for the

> 'rescue [of] the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company *continuing in existence on a solvent basis*, or if it is not possible for the company to so continue in existence, results in a *better return for the company's creditors or shareholders than would result from the immediate liquidation of the company*' (emphasis added).

The primary object of business rescue is, therefore, to save the company as a going concern[48] so that it can continue in existence on a solvent basis. The principal intention is that the company in financial distress continues with business and that it trades-out of its financial problems.[49] Without the protection of the moratorium, this cannot be achieved. The underpinning policy is that the property of third parties that has been hired or leased to the company, or is otherwise in the possession of the company, may be a fundamental component of the company's business and its continued use may thus be vital to the rescue of the company. By freezing the rights of property owners to bring enforcement actions or legal claims to repossess their property from the company, the moratorium prevents property owners from disturbing the company's possession of the property, interfering in the rescue process, and upsetting the chances of saving the company. The wide application of the moratorium to include hired and leased property, and other property possessed but not owned by the company, thus allows the

[47] Paragraph V*(b)* immediately below explains in greater detail the purpose of the moratorium and the prohibition on the repossession of property by the property owner. This is followed by a discussion in paras V*(c)* and *(d)* of a more appropriate and proper approach to the interpretation of the statutory provisions relating to the moratorium and their practical application.

[48] F H I Cassim in F H I Cassim et al, (Juta 2012) 864.

[49] Ibid.

company to continue in business by restricting creditors from depriving the company of property that is key to its business. Without it, the entire business rescue regime would fall apart. If property owners were freely permitted to divest the company of goods or assets used and enjoyed by it, it would impair the business rescue practitioner's capacity to manage the company and to use those assets in the conduct of the company's business with a view to achieving the goal of the rescue. The leased premises from which the company conducts its retail business, for instance, may be essential to the rescue endeavour as they allow the company to continue in business and trade its way out of financial distress. Likewise, vehicles purchased under an instalment sale agreement may be indispensable to the rescue of a transport company; while leased mining equipment may be crucial to the continuation of the commercial activities of a mining operation and the prospects of its successful rehabilitation. The continued operation of the business of the financially distressed company is crucial to the business rescue process.

This is aptly articulated in English law in *Bristol Airport Plc v Powdrill*[50]

> '[the] continuation of the business by the administrator requires that there should be available to him the right to use the property of the company, free from interference by creditors and others during the, usually short, period during which such administration continues.'

Similarly, the Australian court in *Re Java 452 Pty Ltd (admin apptd) v Stout*[51] pronounced that the intention of the moratorium is to prevent a lessor from disturbing the company's possession of premises that may be essential to the success of what is proposed by the administrator. As stated above, the moratorium may cause injustice to property owners and creditors whose claims are postponed, but this is done to save financially viable companies.

When a company in financial distress cannot be rescued by continuing in existence on a solvent basis, the secondary object of business rescue is to give the financially distressed company the opportunity to restructure, so as to provide creditors with a higher return on their debt than they would receive if the company were to go into immediate liquidation.[52] The business rescue practitioner may, for instance,

[50] 1990 Ch 744 at 758.

[51] 1999 32 ACSR 507.

[52] Section 128(1)*(b)*(iii) of the Act; *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2013 (4) SA 539 (SCA) para 26; F H I Cassim in F H I Cassim et al (Juta 2012) 862–863.

attempt to sell the business as a going concern and thereby[53] realise more than it would on liquidation. Likewise in these circumstances, the company's undisturbed possession of leased or hired property by virtue of the moratorium, may be essential to achieving the secondary object of business rescue. The repossession of a company's business premises by the landlord, for example, could make it problematic for the business rescue practitioner to sell the company as a going concern, and could thus compromise the prospects of success of the rescue endeavour to provide a better return for creditors.

The Australian courts clearly recognised the impact of the moratorium on the secondary object of business rescue, by refusing to grant a landlord leave to take possession of its premises from a tenant company under administration in circumstances where the repossession of the premises would have obstructed the possible sale of the company as a going concern.[54] This would have deprived the creditors of the opportunity to approve a proposed deed of company arrangement to achieve that outcome.

The moratorium is thus designed and intended by the legislature to prevent the property owner from mechanically or automatically claiming repossession of its goods or property from a company under business rescue, as this would in many cases defeat the very purpose of the business rescue endeavour by depriving the company of any chance to trade-out of its financial distress, or to be successfully restructured. It is a stated purpose of the Act in section 7*(k)*, to

> 'provide for the efficient rescue and recovery of financially distressed companies, in a manner that *balances the rights and interests of all relevant stakeholders*' (emphasis added).

The moratorium on the enforcement of proprietary rights is designed to achieve the sort of balance envisaged in section 7*(k)*. The relevant provisions must be interpreted and applied by the courts in a way that maintains a proper balance. The statutory provisions must be applied in a manner that gives effect to the purpose of the business rescue process. The moratorium balances, on the one hand, the proprietary rights and interests of the property owner in recovering its property from a company that is under business rescue, and, on the other hand, the rights and interests of the company, its creditors as a whole, its employees, and other relevant stakeholders in the retention by the company of such property. By fettering the right of the property owner

[53] F H I Cassim in F H I Cassim et al (Juta 2012) 863.
[54] See *Re Java 452 Pty Ltd (admin apptd)*.

to dispossess the company of vital property needed by the company for the purposes of the rescue, the moratorium makes it possible for the company to continue its commercial and business activities and thereby gives it the chance of achieving a successful rescue. On balance, in circumstances where the repossession of property by the property owner would stifle the very purpose of the rescue attempt, the benefit gained by the property owner by repossessing its property may be outweighed by the loss inflicted on the company, its other creditors as a whole, its employees, and other stakeholders — hence the operation of the moratorium.

The stay of the property owner's right to recover its property from a company under business rescue is arguably balanced in the Act by three factors that serve to protect the property owner:

(i) First, the business rescue process, together with the moratorium, is intended to operate on a temporary basis only and for a short period. The property owner or creditor retains its right to pursue its claim once the moratorium comes to an end.

(ii) Secondly, the moratorium in section 133(1) is not an absolute bar to the pursuit of legal claims or enforcement by creditors of their rights against a company in business rescue. As stated by the Supreme Court of Appeal, the moratorium 'is not a shield behind which a company not needing the protection may take refuge to fend off legitimate claims'.[55] The moratorium means merely that creditors are unable to bring claims to repossess their property in an unrestricted or mechanical manner, but are subject to the control of the court or the consent of business rescue practitioner, in order to ensure that the rescue attempt is not crushed. This layer of control by the court or the business rescue practitioner is absolutely vital if the business rescue regime is not to be seriously undermined.

(iii) Thirdly, it must be emphasised that the moratorium in section 133(1) has a purely procedural effect.[56] In other words, the purpose of the moratorium is not to destroy or change the substantive *rights* of creditors, but merely temporarily to restrict the *enforcement of those rights*. Consequently, the moratorium does not interfere with or extinguish the contractual rights and

[55] *Chetty t/a Nationwide Electrical* para 39.

[56] See, for example, the English cases *Centre Reinsurance International Co v Curzon Insurance Ltd* [2006] 1 WLR 2863; *Re Nortel Networks UK Ltd* [2010] BPIR 1003; *Re Olympia and York Canary Wharf Ltd*. See also the Australian case *Re Java 452 Pty Ltd (admin apptd)*.

> obligations of the parties to an agreement[57] — although it does delay the enforcement of those rights. In short, the moratorium freezes the enforcement of the rights of creditors. A court or the business rescue practitioner may in appropriate cases lift the automatic stay. Such consent releases the applicant's rights or his property from the freeze and allows him or her to enforce them.[58]

It is consequently submitted that the legislature has struck the proper balance in the Companies Act between the goals of business rescue and the prejudice caused to property owners. The medley of protective measures built into the Act to prevent unfair discrimination against property owners by virtue of the moratorium, serve to advance the purpose of section 7*(k)* of the Act by 'balanc[ing] the rights and interests of all relevant stakeholders' in business rescue.

Rather than making unwarranted inroads into the moratorium contrary to the intention of the legislature, the courts ought to interpret and apply these protective measures in a way that preserves the correct balance between the relevant stakeholders and gives effect to the spirit of the business rescue process. All this serves to show that business rescue is complex. It requires a delicate balancing of the interests of a number of key participants in the process, such as directors, shareholders, employees, trade creditors and institutional creditors.

(c) The proper interpretation of the moratorium on repossession of property

The High Courts[59] appear to have misconstrued the moratorium. They have approached the moratorium from a misguided mindset, as evidenced by such dicta as '[it] could not have been the intention of the legislature to frustrate the rights of property owners and render them remediless during business rescue proceedings',[60] and that the moratorium in section 133(1) would place too great a burden on the property owner 'if it prevents the property owner from recovering its property from a company under business rescue'.[61] Furthermore, rather than interpreting section 7*(k)* in a way that balances the interests of 'all relevant stakeholders' including the company, its employees and its other creditors as a whole, the courts have chosen to interpret

[57] See *Cloete Murray* para 40.
[58] See *Barclays Mercantile Business Finance Ltd v Sibec Developments Ltd* [1993] BCC 148.
[59] See the discussion in para V*(a)* above.
[60] *Kythera Court* para 12.
[61] *JVJ Logistics (Pty) Ltd* para 37.

section 7*(k)* narrowly in a misguided attempt to balance the legal position of the property owner with that of the post-commencement financier.[62] In so doing, the courts have overlooked the fact that for policy reasons, the legislature deliberately chose to confer a super-priority status on post-commencement finance. It was never the intention of the legislature to balance or equalise the treatment of the post-commencement financier and the property owner in business rescue, as there are valid policy reasons for not doing so.[63]

Perhaps in view of its novelty, the judiciary has not yet developed a proper grasp and a developed insight into the philosophy and approach of the new business rescue regime, its purposes, its culture, and its outcomes. As a relatively new regime in South African law, there is still a general lack of familiarity with the intricacies and complexities of the new legislation on business rescue and an enduring need for an informed interpretation of its provisions. The development of a proper approach to business rescue entails a shift in philosophy away from that of winding-up. Unlike liquidation, the paramount purpose of business rescue is the rehabilitation and restructure of a company so that it may continue to operate, provide jobs to its employees, pay the claims of its creditors, and produce a return for its shareholders.[64] In deciding business rescue cases the courts must bear in mind that the business rescue processes, as well as the moratorium, are grounded on the company continuing in business and trading its way out of its financial problems. The moratorium is thus designed and intended to allow the company in business rescue to continue its commercial activities by retaining vital property in its possession, even if the owner of such property wishes to recover it. By ruling that property owners who simply cancel their agreements with a company under business rescue, may mechanically claim the repossession of their property without any need to seek the leave of the court or the consent of the business rescue practitioner to do so, the courts are destabilising a cornerstone of the business rescue regime[65] and undermining its purpose. While it is an accepted truth that companies in some cases may abuse the rescue process by voluntarily initiating business rescue proceedings as a strategy to delay their inescapable winding-up or to frustrate legal actions for payment of their debts, this should not be allowed to cloud

[62] *JVJ Logistics (Pty) Ltd* para 48.
[63] See para V*(b)* above.
[64] F H I Cassim in F H I Cassim et al (Juta 2012) 862.
[65] See the discussion in para V*(b)* above.

the courts' judgment or to impede the development of a sophisticated body of jurisprudence on the moratorium in business rescue.

The point of departure in interpreting a statute, as underscored by the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[66] is the language of the provision itself, read in context, and having regard to the purpose of the provision and the background to the preparation and production of the document. Where the words used are reasonably capable of more than one meaning, each possibility must be weighed in the light of all these factors, and a '*sensible meaning* is to be preferred to one that leads to insensible or unbusinesslike results or *undermines the apparent purpose of the document*' (emphasis added).[67] In other words, a meaning that is likely to further rather than hinder its purpose should be adopted.[68]

In interpreting sections 133(1) and 134(1)*(c)*, the High Courts[69] have focused on the phrase 'lawful possession' or 'lawfully in its possession', and interpreted these phrases broadly. But, as acknowledged by the courts,[70] the phrase 'lawful possession', read alone, can bear two meanings in its literal sense. It may either be interpreted broadly to mean that when a company acquires possession of property in terms of an agreement, it loses 'lawful' possession if the agreement is cancelled (referred to by the court as 'lawful possession in the civil sense'). Alternatively, it may be interpreted more narrowly to mean that the possession must be lawful in the criminal sense, so as to exclude possession obtained by fraud or theft.[71] Where more than one literal meaning is possible, the correct approach, as stated by the Supreme Court of Appeal in *Endumeni's* case, is to weigh each possibility in the light of all the factors, including the purpose of the provision, and to prefer a sensible meaning to one that undermines the apparent purpose of the document.[72] The High Courts, by favouring the wider literal meaning of the phrase 'lawful possession', have effectively 'undermined the apparent purpose' of the legislation and chosen a literal meaning that leads to 'insensible' results. In this regard, the practical implication of 'lawful possession in the civil sense' is that the property owner, by a simple unilateral cancellation of the agreement, is able to prevent the company in business rescue from relying on the moratorium to protect

[66] 2012 (4) SA 593 (SCA) para 18.
[67] *Natal Joint Municipal Pension Fund* para 18.
[68] *Chetty t/a Nationwide Electrical* para 8.
[69] See the discussion in para V*(a)* above.
[70] *JVJ Logistics (Pty) Ltd* paras 32 and 50, with reference to s 133(1).
[71] *JVJ Logistics (Pty) Ltd* paras 24–28, 32 and 50.
[72] *Natal Joint Municipal Pension Fund* para 18, as discussed immediately above.

its ongoing possession of the property, even if such property is crucial to the prospects of success of the rescue endeavour. In other words, the practical outcome is that the property owner may easily circumvent the moratorium in business rescue, merely by cancelling its agreement with the company during the rescue process.[73]

The High Courts' reasons for favouring this interpretation[74] appear to be based on a flawed understanding of the spirit of business rescue and the business rescue culture. In short, the courts have disregarded the purpose of the moratorium, and in so doing have frustrated the intention of the legislature. The purpose of the moratorium in section 133(1), as explained in detail in paragraph V*(b)* above, is to limit the property owner — notwithstanding the cancellation of its agreement with the company — from claiming the return of its property from the company during business rescue, in view of the fact that the repossession of land or goods by the owner would in many cases defeat the purpose of the rescue attempt and so cause heavy loss to the company, its other creditors, employees, and stakeholders to an extent that is disproportionate to the advantage gained by the property owner. The encroachment on the rights of the property owner by virtue of the moratorium is balanced by the property owner's ability to seek the court's permission or the business rescue practitioner's consent under section 133(1)*(a)* or *(b)* for the recovery of its property from the company during business rescue. Section 133(1)*(a)* and *(b)* serves as a safeguard for property owners in deserving cases. In the light of the fundamental purpose of the moratorium, it is submitted that, in order to promote rather than to hinder the purpose of business rescue, the phrases 'lawful possession' and 'lawfully in its possession' in sections 133(1) and 134(1)*(c)* of the Act, must be interpreted to mean lawful possession in the criminal sense, so as to exclude from the ambit of the moratorium property obtained by the company as a result of fraud or theft. It is submitted further that as long as the company's possession of property is attributable to or derives its legal origin from a valid agreement or other lawful causa, and provided that the property has remained in the company's possession, it ought to be regarded as property that is 'lawfully' possessed — with the result that it would fall under the protection of both the section 133(1) moratorium and the protective measures in section 134(1)*(c)* of the Act.

[73] See further para V*(a)* above.

[74] See *JVJ Logistics (Pty) Ltd* para 37; see also the above discussion of the judicial decisions.

(d) The proper approach to the moratorium

Flowing from the proper interpretation of the moratorium in sections 133(1) and 134(1)*(c)* suggested above, the practical implications of the moratorium in business rescue for lessors and other property owners whose property is in the possession of a company under business rescue, are as follows:

(1) The moratorium does not prevent the property owner from cancelling its lease agreement (or other relevant agreement) with the company in business rescue. This may be done by serving a notice of cancellation of the agreement once the contract has been breached. Creditors retain the right to cancel contracts with companies in business rescue, and require the permission of neither the business rescue practitioner nor the court under section 133(1)*(a)* or *(b)* to do so. Cancellation of a contract does not constitute 'enforcement action' within the meaning of section 133(1), and is thus not hit by the moratorium.[75]

(2) The cancellation of the lease agreement (or other relevant agreement), in itself, does not mechanically enable the property owner to proceed to recover its property from the company under business rescue. The moratorium in section 133(1) would prevent the property owner from commencing or proceeding with legal proceedings or enforcement action to repossess its property, unless it is granted the consent of the business rescue practitioner or the leave of the court, or the moratorium comes to an end. Moreover, section 134(1)*(c)* prevents the property owner for the duration of the rescue process from exercising its right to recover the property from the company, unless it obtains the written consent of the business rescue practitioner to do so. For the duration of the business rescue proceedings, the right of the property owner to recover its property is frozen or suspended, so as not to hamper the chances of a successful rescue of the company or its business — irrespective of the cancellation of the agreement by which the company derived possession of the property in the first place.

(3) While the lessor or property owner may not automatically recover possession of its property consequent on the cancellation of its lease or other agreement with the company under business rescue, the cancellation of the agreement is not without effect. By cancelling the agreement, the property owner crystallises or perfects its right to repossession of the property — which right may be exercised

[75] See para III above.

when the business rescue comes to an end. The moratorium, as explained above, has a purely procedural effect.[76] Consequently, the landlord of property leased to a company under business rescue who has cancelled the lease agreement for non-payment of rent, retains its vested *right* to bring legal proceedings for the repossession of its property, although it may be unable to *enforce* that right during business rescue. Its inability so to enforce its right to repossession, does not extinguish or in any way alter its substantive right to repossession.

(4) By cancelling its agreement with the company in business rescue, the property owner not only perfects its right to recover the property, but also obtains a claim for damages. Where a lease agreement has been cancelled, but the company in business rescue retains occupation or possession of the property by virtue of the moratorium, the lessor obtains a right to compensation.

(5) Where the property owner is granted leave or permission by a court to institute legal proceedings to enforce its right to recover the property (or to sue for damages), the grant of leave in no way changes the property owner's substantive legal right — it merely empowers it to enforce that right.[77] The power of the court to grant leave and thereby lift the moratorium in business rescue forms the focus of the second article in this series of articles.

(e) Comparable foreign jurisdictions

The submissions above[78] on the proper interpretation of the moratorium in business rescue and the practical application of the moratorium, are fortified by foreign jurisprudence, particularly English and Australian law.[79] Whether the application of the moratorium is obviated by the cancellation of the lease agreement or other relevant agreement by the property owner, has been addressed by the English courts and by the Australian legislature.

In English law there is, as in South African law, a general moratorium on the enforcement of remedies against a company in administration. No legal process or legal proceedings may be instituted or continued against the company or property of the company without the consent of

[76] See para V*(b)*.
[77] See *Barclays Mercantile Business Finance Ltd.*
[78] In para V*(b)*–*(d)*.
[79] Due to differences in the US legislative provisions, US law is not directly relevant to this issue. For a discussion of US law, see para XII of the second article in this series of articles.

the administrator or the permission of a court.[80] A specific statutory prohibition in English legislation prevents property owners from taking any steps to repossess goods in the company's possession under a hire-purchase agreement or conditional sale agreement, except with the consent of the administrator or leave of a court.[81]

The question arose in *Re David Meek Plant Ltd*[82] whether the application of this prohibition is excluded by the cancellation of the agreement. In sharp contrast to the decisions in South African courts on the same legal issue, the English court in *Re David Meek Plant Ltd* held that the moratorium in administration extends to goods which are subject to a hire-purchase or similar agreement, even where that agreement has been cancelled. The court stated that it is sufficient for the application of the moratorium that the goods came into the possession of the company by virtue of a hire-purchase or other relevant agreement, even if the agreement has subsequently been terminated.[83] The court decided further that the moratorium applies irrespective of whether the agreement was cancelled *before or after* the formal commencement of the administration.

It is submitted that the reasoning of the court in *Re David Meek Plant Ltd* evinces a proper grasp and comprehension of the underlying purpose of the moratorium in business rescue. The South African courts would do well to follow suit.

The English legislation also makes specific provision for a prohibition on a landlord exercising a right of forfeiture by peaceable re-entry of premises leased to the company, without the consent of the administrator or leave of a court.[84] In English law the legal position on the termination of the agreement and repossession of the leased property is similar to the treatment of hire-purchase agreements. While the landlord may terminate the lease by notice, the landlord cannot proceed to enforce forfeiture, whether by re-entry or by proceedings, unless it has the consent of the administrator or the permission of a court to do so.[85]

The position in Australian law is regulated by statute. Once the administration begins, lessors or owners of property in the possession of the company (other than perishable property)[86] are restrained from

[80] Paragraph 43(6) of Schedule B1 to the Insolvency Act, 1986.

[81] Paragraph 43(3) of Schedule B1 to the Insolvency Act, 1986.

[82] *Re David Meek Plant Ltd* 1994 1 BCLC 680, in respect of s 11(3)*(c)* of the original administration regime in the Insolvency Act, 1986, which is now incorporated in para 43(3) of Schedule B1.

[83] See also *In re Business Environment Fleet St Ltd* 2014 EWHC 3540 (Ch).

[84] Paragraph 43(4) of Schedule B1 to the Insolvency Act, 1986.

[85] Paragraph 43(4) of Schedule B1 to the Insolvency Act, 1986.

[86] Section 441G of the Australian Corporations Act, 2001.

recovering possession of their property during the administration, except with the written consent of the administrator or the leave of a court.[87] No proceedings in a court against the company or in relation to any of its property may commence or continue during the administration of a company, except with the administrator's written consent or the leave of the court, and must take place in accordance with any terms the court imposes.[88] Since the lessor or property owner is explicitly empowered by statute to give notices in relation to the property,[89] it may, by notice, cancel the lease agreement or any other agreement relating to the use, occupation, or possession of its property by the company during the administration. This corresponds to the position in both English and South African law, albeit laid down by the courts and not the legislature in these latter jurisdictions. Despite the cancellation of the lease agreement or other relevant agreement during administration, the moratorium in section 440C of the Australian Corporations Act, 2001, prevents the lessor or property owner from taking steps to recover its property from the company during the administration. This is similar to the position in English law as held in *Re David Meek Plant Ltd.*

In one important respect, however, the legal position in Australian law diverges from that in English law. This is a direct result of legislative intervention. The Australian statute distinguishes between circumstances where the property owner seeks to recover its property from the company *during* the administration, and circumstances where the property owner acted to recover its property from the company *before* the administration had begun. The position *during* administration in Australian law (as discussed immediately above) is that the property owner or lessor is prohibited by the moratorium from recovering its property during the administration. An exception, however, is made where an owner of property or a lessor has acted to recover its property from the company *before* the administration had begun. Such persons are empowered to complete the recovery of their property even during the administration in terms of section 441F of the Australian Corporations Act, 2001.[90] This section applies to any person who, *before* the beginning of the administration of a company, entered into possession, or assumed control of property used or occupied by, or in the possession of the company, or exercised any other power in relation to such

[87] Section 440C of the Australian Corporations Act, 2001.
[88] Section 440D(1) of the Australian Corporations Act, 2001.
[89] Section 441J of the Australian Corporations Act, 2001.
[90] Section 441F of the Australian Corporations Act, 2001.

property, for the purpose of enforcing a right of the owner or lessor of the property to take possession of the property or otherwise recover it. To rely on the exception in section 441F, the lessor or owner of property in the company's possession, must have both cancelled the contract and demanded possession before the commencement of the administration. It was held in *Tymray v Mercantile Mutual Life Insurance*[91] that the sending of three letters of demand for unpaid rent with a threat of eviction in the event of non-payment, did not fall within the ambit of the exception to the prohibition in section 441F. Likewise, in *Re Java 452 Pty Ltd (admin apptd) v Stout*[92] the lessor's purported termination of the lease before administration was ineffective, with the result that the lessor properly terminated the lease only after the appointment of the administrator. The court found that as the lease was still in effect at the time of the commencement of the administration, the lessor was hit by the prohibition in section 440C.

Significantly, even in circumstances where a property owner or lessor begins an effective recovery of its property *before* the commencement of the administration, it does not have an absolute right to complete the recovery during the administration. The court retains a residual power under section 441H, on application by the administrator, to order that the property not be repossessed by the property owner. The onus is on the administrator to show why repossession should not be granted, but for the court to make this order it must be satisfied that the interests of the property owner or lessor are adequately protected.[93] Therefore, the Australian legal position is that a property owner who has taken action to recover its property from the possession of the company *before* the commencement of administration, may reclaim the property from the company during the administration without seeking the consent of the court or the administrator, unless the court, on application by the administrator, orders that the property may not be repossessed. The underlying basis is that the property of the lessor or property owner may yet be needed for the purpose of the administration. If the property is an essential part of the company's business, the prospects of a successful rescue of the company would otherwise be obstructed.

There is no legal basis in South African law for drawing a distinction parallel to that drawn in Australian legislation, in terms of which the property owner's ability to recover its property from a company in business rescue turns on whether the property owner, before the

[91] 1994 13 ACSR 111.
[92] 1999 32 ACSR 507.
[93] Section 441H of the Australian Corporations Act, 2001.

initiation of business rescue, had already taken legal steps to recover its property — as occurred, for example, in the South African cases of *Madodza (Pty) Ltd v Absa Bank Ltd;*[94] *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd;*[95] and *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd,*[96] all of which are discussed in paragraph V*(b)* above, but not on the facts of the case of *Kythera Court v Le Rendez-Vous Café CC*,[97] where the property owner sought the recovery of its property only after the commencement of business rescue. It is submitted that, as in English law, the moratorium in section 133(1) of the South African Companies Act, properly interpreted and applied, prevents the property owner from recovering possession of its property in both scenarios — that is, the moratorium applies regardless of whether the property owner takes legal steps to recover its property *before or after* the initiation of business rescue.

There are two main reasons for this submission. First and foremost, the South African Act, as opposed to the Australian legislation, draws no explicit distinction between these two scenarios. The clear intention of section 133(1) is to prevent all legal proceedings and enforcement actions from being 'commenced or *proceeded* with' (emphasis added) in any forum during business rescue proceedings. Secondly, the South African Act contains no safety valve equivalent to that provided by section 441H of the Australian statute. If South African courts were automatically to bar the application of the moratorium to property owners who cancelled their agreements with the company and took steps to recover their property *before* the commencement of business rescue, then there would no residual safety net in the South African Act to empower the courts to make exceptions in worthy cases where the business rescue practitioner is able to show just cause why repossession of the property should not be granted to the property owner.

VI CONCLUSIONS ON THE MORATORIUM IN BUSINESS RESCUE

There is, in principle, nothing to prevent a lessor or other property owner whose property is used, occupied or possessed by a company in business rescue, from cancelling its lease agreement, instalment-sale agreement, or other relevant agreement with the company during

[94] (38906/2012) 2012 ZAGPPHC165 (12 August 2012).
[95] 2016 (6) SA 448 (KZD).
[96] 2016 (6) SA 501 (WCC).
[97] 2016 (6) SA 63 (GJ).

business rescue if the company has breached its contractual obligations, such as its obligation to pay rent or other charges. It makes no difference whether the breach of contract occurred before or after the commencement of business rescue proceedings. Since the cancellation does not amount to 'enforcement action' within the meaning of section 133(1) of the Act, the cancellation of an agreement is not hindered by the moratorium in business rescue.

This general rule, however, is subject to an important exception. Where the business rescue practitioner has, in terms of section 136(2)*(a)* of the Act, suspended the company's obligation to pay rent or other compensation under the agreement, then, by failing to make payments that fall due after the suspension, the company will not be in breach of the agreement and there will consequently be no basis on which the property owner may cancel the agreement. It is submitted that the power of suspension applies only to post-commencement obligations of the company and not to pre-commencement obligations. Thus a failure on the part of the company, at some stage *before* the initiation of business rescue proceedings, to honour its contractual obligations has the consequence that the property owner retains the right to cancel the agreement during business rescue — despite the suspension of the agreement by the business rescue practitioner under section 136(2)*(a)*.

It must be emphasised, however, that the mere cancellation of the agreement by the property owner does not automatically give the property owner the right to claim repossession of its property from the company under business rescue. The recovery of the property by the owner is obstructed by the moratorium contained in section 133(1) and the protective measure in section 134(1)*(c)* of the Act. The moratorium restricts the property owner from freely vindicating its property from the company during business rescue, and applies irrespective of whether the property owner cancelled its agreement with the company *before or after* the commencement of the business rescue proceedings. The wide scope of the moratorium is a cornerstone of the business rescue regime, which limits the ability of the property owner to frustrate the rescue process by dispossessing the company of vital assets needed for its successful rescue. The repossession of land or goods by the property owner would in many cases defeat the very purpose of the rescue endeavour, thus causing loss to the company, its other creditors as a whole, its employees, and other stakeholders, that outweighs the benefit gained by the property owner — hence the application of the moratorium.

Regrettably, the South African courts, perhaps from empathy with the plight of property owners during business rescue, have gone down the

incorrect path in making inroads into the moratorium that may destabilise this cornerstone of the business rescue regime. Instead of relying on the proper protective measures offered by the Act to prevent unfair discrimination against property owners, the courts are inappropriately ruling that the moratorium would not apply at all where the property owner simply cancels its lease agreement or other relevant agreement with the company in business rescue. By eroding the moratorium, the courts are disregarding the intention of the legislature.

The statutory provisions on the right of a landlord or property owner to repossess its premises or take possession of its property are opaque. There are ambiguities in the statutory provisions that must be resolved by the courts by means of statutory interpretation and the adoption of a purposive approach. The judiciary is burdened with the task of developing the legal principles that should apply here. Should property owners be given special privileges when a company goes into business rescue? Business rescue is complex. It requires a delicate and careful balancing of the interests of the company and the conflicting claims of participants in the process. The courts are leaning too heavily in favour of property owners and in so doing are eroding the effectiveness of the moratorium and the successful rescue of financially viable businesses. The courts need to bear in mind that rescuing viable companies or their businesses is, after all, the whole object of the business rescue process. If the moratorium causes injustice to property owners whose claims are postponed, this is done for the sake of saving viable companies and businesses.

The legislature has drawn a proper balance in the Act between the goals of business rescue and the encroachment on the proprietary rights of property owners. Not only is business rescue intended to be a temporary and short-lived process, but additionally the moratorium has a purely procedural effect. The purpose of the moratorium is not to extinguish or change in any way the substantive rights of the property owner, but merely temporarily to restrict the enforcement of those rights. The foremost protective measure for the property owner is that it is not absolutely barred from repossessing its property from the company during business rescue, but is empowered do so with the consent of the business rescue practitioner or with the leave of a court under sections 133(1)*(a)* and *(b)* and 134(1)*(c)*. This layer of judicial control is crucial. Rather than hewing away at the moratorium, the courts ought to focus on the proper development of these protective measures for property owners so as to build up a set of guidelines for the granting of judicial leave and for the lifting of the moratorium in deserving cases.

It lies in the hands of the courts to cultivate a proper approach to the protective measures contained in sections 133(1) and 134(1)*(c)* in a way that will balance the goals and purpose of business rescue against the interests of the property owner, at whose expense the business rescue effort must patently not be conducted. It would be an unacceptable encroachment on the rights of the property owner if a company in business rescue were ordinarily or routinely able to occupy or possess its property against its will and without the payment of any compensation at all, with the result that the business rescue endeavour is invariably run at the property owner's expense. The second article of this two-part series of articles focuses on these protective measures for property owners and on guidelines for the lifting of the moratorium by the courts. The second article will be published in the following issue of this journal.